Supreme Court, U.S.
FILED
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(2)

No. 95-764

In The

# Supreme Court of the United States

October Term, 1995

MARTIN COLLINGS, RICHARD JAMES BEAMER, JAMES C. BANES, MICHAEL SHAY, GUY YEAGER, BILLY R. STAGGS,

Petitioners,

v.

LONGVIEW FIBRE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 1, 1995

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# QUESTION PRESENTED

Whether the Americans With Disabilities Act ("ADA"), 42 USC § 12101, et seq., prohibits the discharge of employees because of their drug-related misconduct at the workplace, even though they may be within the ADA's protected class of persons with a disability caused by prior illegal drug use and may be rehabilitated and not currently using illegal drugs.

# RULE 29.1 LISTING

Longview Fibre Company has no parent companies and no subsidiaries (except wholly owned subsidiaries).

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Respondent Longview Fibre Company ("Longview") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 63 F.3d 828 (1995).

## STATUTORY PROVISIONS INVOLVED

A. Petitioners omit the basic prohibitory provision of the ADA, which is central to this case:

> **"§ 12112. Discrimination**
>
> "(a) **General Rule.** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." (42 USC § 12112(a), emphasis added).

B. Petitioners also omit the sections of the ADA's provision on "Illegal use of drugs" which explicitly authorize Longview's discharge of petitioners (§ 12114(c)). The complete relevant ADA provisions are:

> **"§ 12114. Illegal use of drugs and alcohol**
>
> "(a) **Qualified individual with a disability.** For purposes of this title, the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> "(b) **Rules of construction.** Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who —

"(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

"(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

"(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) and (2) is no longer engaging in the illegal use of drugs.

"(c) **Authority of covered entity.** A covered entity —

"(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

"(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

"(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

> "(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; * * *" (42 USC § 12114).

## SUMMARY OF ARGUMENT

Petitioners were discharged because of their drug-related misconduct at the workplace. They were not discharged because of any alleged drug-caused disability they claim they had. Petitioners were discharged for selling, buying, possessing and/or using marijuana (and in one case cocaine) at the workplace, and/or for smoking marijuana at lunch and returning to work under its influence. Longview has a strict rule against such misconduct and discharged petitioners immediately after learning of their misconduct. There is no evidence that this reason for petitioners' discharges was pretextual.

Petitioners claim that the ADA prohibits their discharge for such misconduct. They base their claim on ADA Sections 12114(a) and (b) (42 USC § 12114(a) and (b)). They claim they were within the class protected by the ADA because they had a "disability" caused by their use of drugs, and because they had

either completed or were participating in rehabilitation and were not "currently engaging in the illegal use of drugs" when they were discharged.

The district court rejected petitioners' claim and granted summary judgment to Longview. The Ninth Circuit affirmed. They held that the ADA does not prohibit discharge for misconduct, but only for discrimination based on a disability. They held that even assuming (without deciding) that petitioners may have been within the class protected by the ADA because of their alleged drug-caused "disability" and alleged lack of "current" drug use, the uncontradicted evidence showed that petitioners were not discharged because of such alleged disability, but because of their drug-related misconduct at the workplace, and therefore the ADA was not violated by Longview. The Ninth Circuit further ruled that ADA § 12114(c) specifically provides that employers have the right to prohibit drug-related misconduct in the workplace.

No reported decision of any circuit court (or of any district court) has ruled otherwise. The Ninth Circuit ruling is clearly correct from the face of the ADA. It is consistent with the Fourth Circuit's ruling in Little v. FBI, 1 F.3d 55 (4th Cir. 1993), as well as other decisions, under the Rehabilitation Act. It is consistent with the fundamental rule that statutes prohibiting

discrimination based on race, sex, disability or other protected class status, do not immunize such protected class members from discipline based on their misconduct.

According to petitioners' argument, a former drug addict (who is within the protected class) who sold illegal drugs at work prior to his rehabilitation could not be discharged for such misconduct when his employer learned of it, whereas an employee who never used drugs in his life (and who therefore is not within the protected class) could be discharged for such misconduct when his employer learns he sold illegal drugs at work. Nothing in the ADA so provides.

Although this happens to be the first published circuit court decision on this question under the ADA, it has none of the characteristics which would support granting certiorari. It only confirms the clear and obvious meaning of the ADA, in accordance with well-established legal principles under parallel protective legislation.

# STATEMENT OF THE CASE

## A. The Facts.

Each of the six petitioners was discharged because of his drug-related misconduct in the workplace (SER 25-30, 32).[1] Petitioners were among 17 employees discharged for such misconduct in November 1992, immediately after Longview learned of it. The uncontradicted affidavits show:

Petitioners worked at Longview's box manufacturing plant which has potentially-dangerous machinery (SER 21, 33-34). Longview has strict rules prohibiting the use, presence or being under the influence of drugs at work, and discharges employees for the first offense involving drugs (SER 20-21, 35, 218, 251). Because of rumors of drug activity, Longview engaged outside investigators who conducted a six-month undercover investigation (SER 21). Thereafter, 18 employees were interviewed and 17 of them, including petitioners, were discharged for drug-related misconduct (SER 20-21, 32, 53-56).

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[1] References to support assertions of fact are to the Supplemental Excerpts of Record before the Ninth Circuit ("SER") containing the uncontradicted affidavits and documents setting forth these facts.

Four of the petitioners (James Banes, Richard Beamer, Martin Collings and Billy Staggs) admitted in their sworn, handwritten statements that they had bought, sold, possessed and/or smoked marijuana (and in one case bought and used cocaine) at the plant site, and/or smoked marijuana at lunch and returned to work under its influence.[2] One of the petitioners (Michael Shay) admitted verbally he had purchased marijuana at

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[2] James Banes admitted "I broke company rules by smoking marijuana in company parking lot and pallet area, during lunch & work," buying marijuana on the company parking lot, and selling marijuana "on company property and time, the last time 2 months ago" (SER 153).

Richard Beamer admitted "Smoking marijuana in the company parking lot, * * * smoking marijuana at lunch off company property about 300 times and then returning to work under its influence, * * * buying * * * marijuana * * * in the company lunch room * * * the last time last week, * * * middling * * * marijuana in various areas of the facility to employees, * * * using cocaine in the company parking lot" and "buying * * * cocaine in various areas" (SER 155).

Martin Collings admitted "Smoking marijuana * * * during lunch and returning to work" on numerous occasions with many other employees, the last time "4 to 5 months ago" and "I also know that because of my involvement I could be terminated" (SER 160-161.

Billy Staggs admitted "Smoking marijuana about 3 times a week in the last 12 months * * * returning to work under its influence, the last time [during the last week] * * * I smoked marijuana about 3 times a week in the last 12 months in the pallet area [on plant premises] * * * I sold marijuana * * * arranged at work * * * I know because of my actions I could lose my job" (SER 191-192).

work, smoked it at work, and provided it to other employees at work.[3] The sworn statements of other employees described drug-related misconduct at the workplace of each petitioner.[4] One of the petitioners (Guy Yeager) did not admit any misconduct and denied any drug involvement either on or off company premises, but the sworn statements of eight employees stated he had sold and bought marijuana at the workplace, and had smoked marijuana at lunch and returned to work under its influence, and the undercover investigator learned Yeager was a reputed source for marijuana[5]; and when Yeager pled guilty to the felony of possessing marijuana with intent to deliver,

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[3] The affidavits of the persons who interviewed Michael Shay state (without contradiction) that Shay told them he had smoked marijuana at work, purchased marijuana at work about ten times (the last three times within the last three months), and provided marijuana to other employees at work (SER 59-61, 64-65, 186-189).

[4] Banes: SER 160, 166, 169, 191; Beamer: SER 157, 160, 167, 169, 357; Collings: 157, 167, 170, 181, 183; Staggs: 160, 169-170, 172, 183, 184; Shay: 160, 167, 169, 363-364; Yeager: 157, 160, 166, 169, 183-184, 191, 306, 365).

[5] SER 69-70, 157, 160, 166, 169, 183-184, 191, 200-211, 306, 365.

Longview concluded he had lied about his drug activities and discharged him.[6]

Petitioners' complaints are all in identical form and concede each of them "was terminated for the use and/or sale of illegal drugs" (Complaints, ¶ IV; SER 2-16). Their brief in opposition to Longview's motion for summary judgment states: "Plaintiffs concede drug usage, drug purchases, drug sales in a variety of circumstances and in many cases on company property" (see Ninth Circuit decision at page 10a of Petitioners' Appendix A, 63 F.3d at 832).[7]

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[6] SER 30-31, 43, 412-414.

In Yeager's subsequent testimony before a labor arbitrator hearing his grievance under the applicable labor contract, in which Yeager claimed he was not discharged for just cause, Yeager admitted he was a dealer in marijuana and frequently sold marijuana to Longview employees who often smoked marijuana at his house during lunch time and returned to work (SER 422, 425, 430, 436-437). The arbitrator found Longview had just cause to terminate Yeager because of his drug-related activities at the workplace (SER 439-494).

[7] Petitioners' statement that "The drug usage of petitioners had terminated anywhere from six weeks prior to termination up to eighteen weeks prior to termination" (Petition, p. 4) is misleading at best. Petitioners were discharged for misconduct (not for "drug usage"), immediately after Longview learned of their misconduct. The misconduct had occurred at least as recently as "2 months ago (Banes' own written statement) (SER 153), "last time last week" (Beamer's own written statement) (SER 155),

(continued...)

The decisions to discharge Petitioners (and the other 11 employees) were all made solely by Longview's general counsel, Robert Arkell, and were based entirely on their misconduct (SER 20, 25-32).[8] Arkell did not even know of any "disability" that petitioners allegedly had; at no time had anyone ever asserted to Arkell (or to anyone else at Longview) that any petitioner had allegedly ever been dependent upon or addicted to any controlled substance (SER 31-31, 39, 44-45).

B. **The Decisions of the District Court and Court of Appeals.**

1. Petitioners (and two others of the 17 discharged employees) each brought separate actions in district court claiming their discharge violated the ADA.[9] The district court granted Longview's motion for summary judgment. It rejected

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[7](...continued)
"4 to 5 months ago" (Collings' own written statement) (SER 160-161), "last time 11-9-92 [within the prior week]" (Staggs' own written statement) (SER 191-192), "three times within the last three months (Shay's verbal statement) (SER 64-65), and "last time 3 months ago" (employee's statement concerning Yeager) (SER 169).

[8] Arkell is an attorney and was a judge of the Washington Superior Court before going to Longview in 1970 (SER 19-20).

[9] Petitioners also alleged pendent claims under Washington's handicap law (RCW 49.60.180), which the courts below also dismissed.

petitioners' argument that the ADA prohibited petitioners' discharge for their drug-related misconduct if petitioners could prove they were within the class protected by the ADA by virtue of their being rehabilitated prior drug users:

> "Now, in each of the individual plaintiffs' cases, we have without question misconduct * * *.
>
> * * * * *
>
> "So this gets to the issue of misconduct, and Mr. Putney, I have difficulty accepting your position that if there is a disability, then prior misconduct can be ignored. I think that the record is clear that there is really no material issue of fact in this record to indicate other than that Longview terminated these eight employees because of their misconduct. * * *
>
> "It doesn't seem realistic that Congress would pass a law that would prohibit an employer under circumstances such as that from discharging an employee who has been in clear violation of not only company policy, but public policy and social policy, and other federal policies * * *.
>
> * * * * *
>
> "* * * So I don't need to really find whether or not these plaintiffs had disabilities that would give them protection or have them classified as protected persons under the ADA." (Decision of U.S. District Court,

Eastern District of Washington, March 28, 1994, at pages 23a, 25a, 27a of Petitioners' Appendix B.)[10]

2. The Ninth Circuit affirmed. Like the district court, it ruled that even assuming petitioners were within the ADA's protected class of persons with a disability, Longview did not violate the ADA when it discharged petitioners because of their drug-related misconduct at the workplace; and that the

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[10] The district court also stated:

> "* * * I feel that more likely than not that [petitioners] would not be qualified because of their illegal use of drug activity, which would exempt them from protection under the Act, but the real basis for my determination is, as I said a moment ago, is the discharge being based on misconduct. * * *" (Id. at p 28a.)

And in response to petitioners' counsel's inquiry of whether "misconduct, regardless of when it occurred, was sufficient to justify a discharge" the district court stated:

> "* * * I find that in every single case the misconduct was not so far into the history, past history that it would suggest that the employer acquiesced or condoned it.
>
> "* * * [I]n no case do I feel that the employer sat on the knowledge [of the misconduct] without acting, and by so doing acquiesced, or became estopped from terminating the employee." (Id. at pp 28a-29a.)

affidavits and petitioners' admissions showed there was no material issue of fact concerning this:

> "Even assuming, without deciding, that the plaintiffs had such a [drug-caused] disability, we are not persuaded by their argument [that Longview violated the ADA by discharging them for their misconduct]. * * *" (Opinion of U.S. Court of Appeals for the Ninth Circuit at page 8a of Petitioners' Appendix A ("Pet App A"), 63 F.3d at 832.)

The court relied on the "distinction between termination of employment because of misconduct and termination of employment because of a disability" (Pet App A p 9a, 63 F.3d at 832, emphasis added), and followed the Fourth Circuit's Rehabilitation Act decision in Little v. FBI, 1 F.3d 255 (4th Cir. 1993) which stated "employers must be allowed to terminate their employees on account of misconduct, 'irrespective of whether the employee is handicapped'" (Ibid). The court found that "Longview terminated the employees on the basis of their drug-related misconduct" (Pet App A p 10a, 63 F.3d at 832) and therefore held there was no violation of the ADA.

The court also relied on ADA § 12114(c), which specifically authorized Longview to "prohibit drug-related

misconduct at the workplace" (Pet App A p 8a, 63 F.3d at 832).[11]

The court ruled that Petitioners had produced no specific facts supporting any claim that Longview's stated reason for discharging them was mere pretext: Four of petitioners (Banes, Beamer, Collings and Staggs) admitted their misconduct throughout, and presented no evidence of pretext. Although Shay later recanted at least some of his verbal admissions, and Yeager did not admit to workplace misconduct, neither presented any evidence of pretext:

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[11] Like the district court (see footnote 10 above), the Ninth Circuit also expressed doubt whether petitioners were within the protected class. The court noted: (1) that ADA § 12114(a) excludes persons "currently engaging in the illegal use of drugs" from the ADA's protected class, (2) that under the Equal Employment Opportunity Commission's regulations, "'the term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.' 29 C.F.R. § 1630.3 App," and (3) that petitioners' "own admissions of drug involvement during the weeks and months prior to their discharge indicated that they were recently involved in drug-related misconduct" (Pet App A pp 10a-11a, 63 F.3d at 833).

However, the court's decision was that "[e]ven assuming, without deciding" (Pet App A p 8a, 63 F.3d at 832) that petitioners were within the protected class, Longview did not violate the ADA when it discharged them for their drug-related misconduct at the workplace.

"Yeager and Shay have not come forward with any specific allegations of pretext. Even if it is assumed that they had a medically cognizable drug addiction disability, there was no showing that Longview had any knowledge of it and that Longview fired them because of it, rather than because of misconduct. There is no indication that Yeager and Shay were treated differently from other employees who engaged in similar conduct. Therefore, they have not produced sufficiently specific facts of pretext to avoid summary judgment. * * *." (Pet App A pp 12a-13a, 832 F.3d at 834.)[12]

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[12] Petitioners' Statement of the Case asserts: "The Court [of Appeals] further requires petitioners to meet the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) shifting burden of going forward with the evidence which is inappropriate under this section of the ADA" (Petition p 5). However, the Ninth Circuit followed the requirement, well established in numerous cases involving adverse employment actions by employers against persons in a protected class, that the claimant must present some substantial evidence of pretext to avoid a summary judgment after the employer has presented substantial evidence of the non-discriminatory reason for the adverse action. The cases cited by the Ninth Circuit below amply illustrate that requirement, Steckl v. Motorola, Inc., 703 F.2d 392 (9th Cir. 1983), Smith v. Barton, 914 F.2d 1330, 1340 (9th Cir. 1990), cert. denied 501 U.S. 1217 (1990), Landefeld v. Marion Gen. Hosp., 994 F.2d 1178, 1181 (6th Cir. 1993).

## REASONS FOR DENYING THE WRIT

There is no reasonable basis for granting certiorari in this case:

A. **There are no conflicting decisions or regulations.** There are no contrary reported decisions by either the circuit courts of appeal or the district courts.[13] There is no inconsistency with regulations under the ADA, or with government agency practice.

B. **The decision is clearly correct from the face of the ADA.** Although this is the first court of appeals decision on point under the ADA, the ruling is clear from the face of the ADA:

1. The ADA's basic provision (which petitioners omit) prohibits only "Discrimination * * * because of [a] disability" (42 USC § 12112(a), emphasis added). It does not give to those with a disability a license to engage in misconduct.

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[13] The district court in Massachusetts interpreted the ADA the same as the Ninth Circuit, Flynn v. Raytheon Co., 868 F. Supp. 383, 387 (D. Mass. 1994) ("While the ADA * * * protects an individual's status as an alcoholic, it is clear that a company need not tolerate misconduct such as intoxication on the job").

Petitioners were discharged because of their misconduct. The ADA does not prohibit discharge for misconduct. The Ninth Circuit so ruled.

2. ADA §§ 12114(a) and (b) (on which petitioners rely), show on their face that they do not give drug abusers a license to engage in misconduct, or immunity for their past drug-related misconduct at the workplace. Section (a) only excludes from the protected class persons "currently engaging in the illegal use of drugs when they receive adverse action based on such use"; it reduces drug-users' protections, it does not give to them greater protection than to others. Section (b) only states rules for construing Section (a) — making it clear that Section (a) does not exclude from the protected class rehabilitated (or rehabilitating) prior drug users provided they are not currently drug users, or exclude persons erroneously regarded as being users; it (like Section (a)) also does not give to such persons greater protections than to others. Petitioners' reliance on these sections is misplaced. Prior drug users, just like all persons within the ADA's protected class, can be discharged for their misconduct — just like all persons who are

not within the ADA's protected class. The Ninth Circuit so ruled.

3. ADA § 12114(c) (which petitioners also omit) specifically confirms that employers

"(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

"(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

"(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);[14]

"(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; * * *" (42 USC § 12114(c)).

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[14] As the Ninth Circuit observed (see Pet App A p 4a, 63 F.3d at 830), Longview is a federal government contractor, and therefore covered by the Drug-Free Workplace Act (SER 21). That Act requires Longview to certify "that it will provide a drug-free workplace" and must prohibit in the workplace the "distribution, dispensation, possession or use of a controlled substance" and requires that employees be notified "that as a condition of employment" the employees must "abide by the terms" of this prohibition (41 USC § 701(a)(1)).

As the Ninth Circuit below states, § 12114(c) thus "specifically provides that employers have the right to prohibit drug-related misconduct at the workplace" (Pet App A p 8a, 63 F.3d at 832). Indeed, the Drug-Free Workplace Act, which applies to Longview and is specifically referenced in ADA § 12114(c)(3), requires "as a condition of employment" that employees not be involved in the "distribution, dispensation, possession or use of a controlled substance" at the workplace (see footnote 14, supra). And ADA § 12114(c)(4) explicitly states that drug users may be held to the "same * * * standards for * * * behavior that [the employer] holds other employees, even if any unsatisfactory * * * behavior is related to the drug use * * * of such employee"; this is exactly what Longview did here, and as ruled by the Ninth Circuit, this was specifically authorized by the ADA.

Where (as here) the statute is clear on its face, and where (as here) the court of appeals' application of it is correct, clear and cogent, no useful purpose would be served by this Court's review.

C. **The decision accords with decisions under the Rehabilitation Act and other statutes prohibiting discrimination against persons in a protected class.** Protective legislation, such as the ADA, prohibits discrimination against persons because of their protected class status. It does not give any person license to engage in misconduct because of membership in a protected class. Thus, the Ninth Circuit followed Little v. FBI, 1 F.3d 255 (4th Cir. 1993), which holds the Rehabilitation Act does not prohibit discharge for the misconduct of being intoxicated while on duty, even if the employee is within that Act's protected class because of his alcoholism (Pet App A pp 9a-10a, 63 F.3d at 832-833). The court cites other decisions with similar rulings.[15] Indeed, cases are legion under Title VII and other protective legislation, that hold discharge based on misconduct is not a violation.

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[15] Grimes v. U.S. Postal Serv., 872 F. Supp. 668, 675 (W.D. Mo. 1994), Richardson v. U.S. Postal Serv., 613 F. Supp. 1213, 1215 (D. D.C. 1985), Wilber v. Brady, 780 F. Supp. 837, 840 (D. D.C. 1992).

See also Leary v. Dalton, 58 F.3d 748, 753 (1st Cir. 1995) ("* * * [T]he [Rehabilitation] Act neither prevents employers from holding 'persons suffering from alcoholism * * * [to] reasonable rules of conduct,' nor protects alcoholics from the consequences of their own misconduct").

## CONCLUSION

Petitioners were discharged because of their drug-related misconduct at the workplace. The Ninth Circuit correctly affirmed the district court's ruling that this did not violate the ADA. No court has ruled otherwise. There is no reasonable basis for this Court to review this ruling, which is clear from the face of the ADA and in accordance with rulings under other protective statutes.

Respectfully submitted,

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